

**UNDERSTANDING PUBLIC JUSTICE:  
AN INTRODUCTION TO THE ROLES OF THE ATTORNEY GENERAL,  
THE DEPARTMENT OF JUSTICE, AND DISTRICT ATTORNEYS**  
(posted at <http://www.doj.state.wi.us/site/divs.asp>)

Thank you for visiting the website of the Wisconsin Attorney General and the Wisconsin Department of Justice. We hope you will find the assistance or information you seek. If not, please visit our “Contact DOJ” page for information about writing or calling the Department.

On this part of the website, we offer a detailed explanation of the work of the Attorney General and the Department of Justice. Many misconceptions exist about the roles, responsibilities, and powers of the Attorney General and the Department of Justice. We hope you will find the following essay helpful in understanding the range and complexity of the work we do on behalf of the people of Wisconsin.

From Wisconsin’s entry into the Union in 1848,<sup>1</sup> the Wisconsin Constitution has provided for the office of Attorney General and made it an elected position.<sup>2</sup> Under the Wisconsin Constitution, the Attorney General does not have any inherent powers: in language that has remained unchanged since 1848, Article 6, Section 3 of the constitution provides that “[t]he powers, duties and compensation of the . . . attorney general shall be prescribed by law.”

The constitution itself imposes only one obligation on the Attorney General: to serve as a member of “a board of commissioners for the sale of the school and university lands and for the investment of the funds arising therefrom.”<sup>3</sup> By creating the office of Attorney General but leaving its powers and duties almost completely undefined, the Wisconsin Constitution relegated the definitional function to the Wisconsin legislature. The Wisconsin statutes reflect the legislature’s response: the statutes contain nearly 370 separate sections referring to the Attorney General and conferring various duties, responsibilities, and powers on that office.

In the course of defining the office of Attorney General, the Wisconsin legislature eventually created the Wisconsin Department of Justice (DOJ), placed it “under the direction and supervision of the attorney general,”<sup>4</sup> and specified some of DOJ’s organization,

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<sup>1</sup> On August 6, 1846, the United States Congress authorized “the people of the Territory of Wisconsin . . . to form a constitution and State government, for the purpose of being admitted into the Union on an equal footing with the original States in all respects whatsoever.” 9 Stat. 56 (1846). On March 3, 1847, Congress approved admitting Wisconsin as a State once “the qualified electors” in the territory adopted a constitution. 9 Stat. 178-79 (1846). On February 1, 1848, a Wisconsin territorial convention approved the constitution. 1849 Wis. Rev. Stat. at 45. On March 13, 1848, Wisconsin voters ratified it. *Wisconsin Blue Book 2001-2002*, at 194 n.\*. On May 29, 1848, Wisconsin became a State. *Wisconsin Blue Book 1958*, at 216.

<sup>2</sup> 1849 Wis. Rev. Stat. at 27 (reprinting Wis. Const. art. VI, § 1).

<sup>3</sup> Wis. Const. art. X, § 7.

<sup>4</sup> Wis. Stat. § 15.25. The legislature created the Department of Justice in 1968. 1967 Wis. Laws ch. 327, § 13, at 889 (approved Jan. 12, 1968; published Feb. 17, 1968).

creating within the Department two divisions (Division of Criminal Investigation [DCI] and Division of Narcotics Enforcement [DNE]),<sup>5</sup> a crime victims council,<sup>6</sup> and a university and crime labs cooperation council.<sup>7</sup> In addition, the legislature assigned DOJ the responsibility of supporting the Wisconsin Law Enforcement Standards Board.<sup>8</sup>

Chapter 165 of the Wisconsin statutes sets out in some detail the duties of the Attorney General<sup>9</sup> and DOJ.<sup>10</sup> In particular, the legislature has assigned DOJ the obligation to

appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded to any circuit court in which the state is a party; and, if requested by the governor or either house of the legislature, appear for and represent the state, any state department, agency, official, employee or agent, whether required to appear as a party or witness in any civil or criminal matter, and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested. The public service commission may request . . . that the attorney general intervene in federal proceedings.<sup>11</sup>

The legislature has also assigned DOJ an array of other mandatory responsibilities, which include obligations to

- “furnish all legal services required by the investment board, the lottery division in the department of revenue, the public service commission, the department of transportation, the department of natural resources, the department of tourism and the department of employee trust funds, together with any other services, including stenographic and investigational, as are necessarily connected with the legal work”;<sup>12</sup>
- “furnish legal services to the department of regulation and licensing in all proceedings under s. 440.21 (3), together with any other services, including stenographic and investigational, as are necessarily connected with the legal services”;<sup>13</sup>
- “furnish all legal services required by the department of agriculture, trade and consumer protection relating to the enforcement of [seventeen separate sections of Chapter 100 of the Wisconsin Statutes and six complete chapters of

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<sup>5</sup> Wis. Stat. § 15.253. Legislation pending in early 2003 proposes to consolidate these divisions to eliminate duplication of overlapping functions and to achieve some administrative efficiencies and budget savings.

<sup>6</sup> Wis. Stat. § 15.257(2).

<sup>7</sup> Wis. Stat. § 15.257(1).

<sup>8</sup> Wis. Stat. § 15.255.

<sup>9</sup> Wis. Stat. § 165.015.

<sup>10</sup> Wis. Stat. § 165.25.

<sup>11</sup> Wis. Stat. § 165.25(1).

<sup>12</sup> Wis. Stat. § 165.25(4)(a).

<sup>13</sup> Wis. Stat. § 165.25(4)(am).

the statutes], together with any other services as are necessarily connected to the legal services”;<sup>14</sup>

- “furnish bond counsel services to the building commission when the building commission contracts public debt under subch. I of ch. 18”;<sup>15</sup> and
- “provide legal services, other than those relating to civil actions or opinions, under ch. 150 to the department of health and family services.”<sup>16</sup>

In addition, the legislature has denominated the Attorney General as the attorney for the State of Wisconsin:

At the request of the head of any department of state government, the attorney general may appear for and defend any state department, or any state officer, employee or agent of the department in any civil action or other matter brought before a court or an administrative agency which is brought against the state department, or officer, employee or agent for or on account of any act growing out of or committed in the lawful course of an officer’s, employee’s or agent’s duties. Witness fees or other expenses determined by the attorney general to be reasonable and necessary to the defense in the action or proceeding shall be paid as provided for in s. 885.07. The attorney general may compromise and settle the action as the attorney general determines to be in the best interest of the state. Members, officers and employees of the Wisconsin state agencies building corporation and the Wisconsin state public building corporation are covered by this section. Members of the board of governors created under s. 619.04 (3), members of a committee or subcommittee of that board of governors, members of the patients compensation fund peer review council created under s. 655.275 (2) and persons consulting with that council under s. 655.275 (5) (b) are covered by this section with respect to actions, claims or other matters arising before, on or after April 25, 1990. The attorney general may compromise and settle claims asserted before such actions or matters formally are brought or may delegate such authority to the department of administration.<sup>17</sup>

The legislatively assigned responsibilities of the Attorney General and DOJ do not end there:

The department of justice may appear for and defend the state or any state department, agency, official or employee in any civil action arising out of or relating to the assessment or collection of costs concerning environmental cleanup or natural resources damages including actions brought under 42 USC 9607. The action may be compromised and settled in the same manner as provided in par. (a). At the request of the department of natural resources, the department of justice may provide legal representation to the state or to the department of natural resources in the same matter in which the department of justice provides defense counsel, if the attorneys representing those interests are assigned from different organizational units within the department of justice.<sup>18</sup>

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<sup>14</sup> Wis. Stat. § 165.25(4)(ar).

<sup>15</sup> Wis. Stat. § 165.25(4)(b).

<sup>16</sup> Wis. Stat. § 165.25(4)(bn).

<sup>17</sup> Wis. Stat. § 165.25(6)(a).

<sup>18</sup> Wis. Stat. § 165.25(6)(e).

At the request of the head of any department or agency of state government, the attorney general may appear for and represent any state official, employee or agent who is required to appear as a witness in any administrative or civil matter.<sup>19</sup>

The department of justice shall perform all other duties imposed upon the department by law.<sup>20</sup>

This summary of the Attorney General's and DOJ's duties and responsibilities — a summary that affords only a hint of the complex and wide-ranging work of the Attorney General and DOJ — highlights a point well known within DOJ but little recognized elsewhere: because of the legislature's assignment of mandatory duties and responsibilities, the majority of DOJ's legal work concerns civil rather than criminal matters. Of the 92 Assistant Attorneys General (including three limited-term attorneys), 52 work in areas involving non-criminal legal matters, 39 work in criminal-law areas, and one works full-time managing the administrative aspects of running the division in which nearly all of those attorneys work. This allocation of legal resources within DOJ reflects the legislature's decision about how DOJ should handle the legal work of the State of Wisconsin.

In effect, DOJ operates as a large, multi-faceted law firm created by the legislature to represent the interests of the State of Wisconsin on behalf of the people of Wisconsin - a law firm with more than 560 employees (including 92 attorneys), an annual budget of more than \$75 million, and extensive, complex legal responsibilities.

Contrary to a common impression, the Attorney General does not function as a “super District Attorney” with a mandate to roam Wisconsin subsidizing District Attorneys' offices with DOJ assets. Nor does DOJ operate as a “super DA's office” with wide-ranging statewide law-enforcement responsibility. Instead, the legislature created DOJ and District Attorneys' offices with distinct if occasionally overlapping duties and responsibilities.

As with DOJ, the legislature has defined the responsibilities of District Attorneys and their offices.<sup>21</sup> In 1990, the legislature reorganized the prosecution system in Wisconsin by bringing District Attorneys and their deputies and assistants onto the state payroll and making the State of Wisconsin, not the counties, responsible for ensuring the adequacy of prosecutorial resources statewide.<sup>22</sup>

In restructuring the prosecution system, the legislature placed the management and supervision of state prosecutors not under the Attorney General and within DOJ, but un-

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<sup>19</sup> Wis. Stat. § 165.25(6m).

<sup>20</sup> Wis. Stat. § 165.25(9).

<sup>21</sup> Like the office of Attorney General, the office of District Attorney traces its roots to the Wisconsin Constitution adopted in 1848. 1849 Wis. Rev. Stat. at 28 (reprinting Wis. Const. art. VI, § 4). For a sense of the continuity of the office, see Article 6, Section 4 of the Wisconsin Constitution in the current edition of Wisconsin Statutes.

<sup>22</sup> 1989 Wis. Act 31, § 2900. The change took effect on January 1, 1990.

der the Governor and within the Department of Administration, in the State Prosecutors Office.<sup>23</sup> This placement recognizes the critical distinctions in the roles played by the Attorney General, the Wisconsin Department of Justice, and the District Attorneys and their offices — distinctions that have their roots in responsibilities the legislature assigned the Attorney General and District Attorneys in the earliest years of statehood.

The legislature conferred almost all criminal prosecution responsibilities on District Attorneys, not the Attorney General or DOJ: “The district attorney *shall* . . . [e]xcept as otherwise provided by law, *prosecute all criminal actions* before any court within his or her prosecutorial unit.”<sup>24</sup> By contrast, with limited exceptions, the legislature conferred on DOJ the obligation to “appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded to any circuit court in which the state is a party.”<sup>25</sup>

In effect, the legislature created a division of labor in terms of criminal-law matters handled by the State: except in extraordinary circumstances, District Attorneys handle the trial-level prosecution of crimes, and DOJ handles the appellate-level prosecution of serious crimes.

The legislature reinforced this division by limiting the Attorney General’s power to intrude on District Attorneys’ turf. The legislature requires DOJ to “[c]onsult and advise with the district attorneys *when requested by them* in all matters pertaining to the duties of their office.”<sup>26</sup> As for criminal-prosecution responsibilities, the legislature instructed DOJ to “[i]nvestigate crime that is statewide in nature, importance or influence,”<sup>27</sup> but to *enforce* through prosecution just a *select* group of statutes relating to crimes of a statewide character.<sup>28</sup> The legislature explained: “It is the intention of this section to give the attorney general responsibility for devising programs to control crime statewide in nature, importance or influence, drugs and narcotics abuse, commercial gambling, prostitution, and arson.”<sup>29</sup>

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<sup>23</sup> <<http://www.doa.state.wi.us/doas/spo/index.asp>>.

<sup>24</sup> Wis. Stat. § 978.05(1) (emphases added).

<sup>25</sup> Wis. Stat. § 165.25(1). The Wisconsin legislature used substantially similar language to define one of the Attorney’s General’s responsibilities in 1848:

The attorney general shall appear for the state, and prosecute and defend all suits and proceedings civil or criminal, in the supreme court, in which the state shall be involved or a party; and shall also when requested by the governor or either branch of the legislature, appear for the people of this state, and prosecute or defend in any other court, or before any officer, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.

1849 Wis. Rev. Stat. ch. 9, § 36.

<sup>26</sup> Wis. Stat. § 165.25(3) (emphasis added). The Wisconsin legislature used nearly identical language to define one of the Attorney’s General’s responsibilities in 1848: “The attorney general shall consult with and advise the district attorneys, when requested by them, in all matters pertaining to the duties of their office.” 1849 Wis. Rev. Stat. ch. 9, § 38.

<sup>27</sup> Wis. Stat. § 165.70(1)(a) (emphasis added).

<sup>28</sup> Wis. Stat. §§ 165.60, 165.70(1)(b), (d).

<sup>29</sup> Wis. Stat. § 165.70(3).

Thus, the legislature assigned DOJ responsibility for a small class of crimes the legislature regarded as requiring a statewide response, and left responsibility for prosecuting crime of a local character — that is, nearly all crime, whether misdemeanors or felonies — to District Attorneys and their staffs.

This division is also reflected in the limitations on a District Attorney's ability to commandeer resources under the control of the Attorney General. A District Attorney may ask a court to appoint an Assistant Attorney General as a special prosecutor,<sup>30</sup> but the court may do so only when (1) the District Attorney has offered good reasons for the appointment and (2) any of eight statutorily specified circumstances exist.<sup>31</sup> In addition, a District Attorney may ask for voluntary assistance from other District Attorneys' offices and from DOJ, but cannot compel that assistance:

The district attorney may request the assistance of district attorneys, deputy district attorneys, or assistant district attorneys from other prosecutorial units or assistant attorneys general who then may appear and assist in the investigation and prosecution of any matter for which a district attorney is responsible under [Chapter 978] in like manner as assistants in the prosecutorial unit and with the same authority as the district attorney in the unit in which the action is brought.<sup>32</sup>

Wisconsin Attorneys General and DOJ have long provided Wisconsin prosecutors with assistance of the sort the legislature has authorized. DOJ sends special prosecutors and other prosecutorial resources to aid District Attorneys who request that assistance when they find themselves in especially difficult circumstances. DOJ runs a telephone hotline, staffed by an array of DOJ's experienced trial and appellate lawyers, that Wisconsin prosecutors can call for spur-of-the-moment assistance with legal and practical problems that arise in criminal prosecutions; criminal-law Assistant Attorneys General also receive and answer e-mail inquiries from Wisconsin prosecutors seeking legal and practical advice about their cases. DOJ provides criminal investigative and enforcement resources through the State Crime Laboratories, the Division of Criminal Investigation, and the Division of Narcotics Enforcement. Through the Statewide Prosecutor Education and Training Program, DOJ provides Wisconsin prosecutors with high-quality, low-cost training year after year. DOJ's Training and Standards Bureau provides training to law enforcement personnel throughout Wisconsin.

In DOJ, a presumption exists in favor of assisting District Attorneys when they request help at the trial level. An array of factors will drive the decision whether to acquiesce in a request, but the most common reasons for denying requests involve lack of sufficient resources at DOJ to take on or assist in the case, and a conclusion that the request does not seek an appropriate use of DOJ experience and resources. When the request involves a conflict of interest requiring the District Attorney's office to disqualify itself from a prosecution, or when the request involves a complex case requiring prosecutorial experience and resources unavailable at the local level, or when the case mushrooms

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<sup>30</sup> Wis. Stat. § 978.045(1g).

<sup>31</sup> Wis. Stat. § 978.045(1r).

<sup>32</sup> Wis. Stat. § 978.05(8)(b).

from a local crime into one with more of a statewide character, DOJ will tend to accept the District Attorney's invitation.

Thus, the Attorney General and the Wisconsin Department of Justice (on the one hand) and District Attorneys and their staffs (on the other) work together as complementary components of an efficient, cost-effective system for representing the public's legal interests. This relationship has existed and worked well from the earliest days of Wisconsin statehood, and we expect that cooperative relationship to continue, providing Wisconsin with significant benefits long into the future.

As we hope this brief overview has shown, the Attorney General and the Department of Justice have long and proudly served the people of Wisconsin. We welcome, without reservation, the daily opportunity to continue that tradition. That's our job, and that's our pledge.

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